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Pal Associates Sdn Bhd v The Syndicate of the Press of the University of Cambridge being authorised by the Chancellor Masters and Scholars of the University of Cambridge

HIGH COURT (KUALA LUMPUR) — SUIT NO D4–22–473 OF 2006
ASMABI MOHAMAD JC
13 JUNE 2013

Damages — Assessment — Appeal against assesment — Appeal arose from claim for termination of exclusive distributorship agreement — Termination alleged done hastily — Allegation of damages — Assessment of damages by deputy registrar for loss of profit of three months — Principles in awarding damages — Burden of proving amount of damages

The plaintiff's claim against the defendant was premised on a wrongful termination of an exclusive distributorship agreement for the distribution and sale of English Language Teaching ('ELT') products and/or materials published by the defendant ('exclusive distributorship'). The plaintiff claimed that the termination of the exclusive distributorship agreement was done hastily and without the required notice and as a result, it suffered damages. The parties then agreed to enter into a consent judgment whereby the defendant admitted liability with damages to be assessed by the court. The deputy registrar ('the DR') assessed damages and awarded RM114,805 for loss of profit for three months with interests and costs in the sum of RM10,000 to be paid by the defendant to the plaintiff. The DR rejected the plaintiff's claim for reimbursement of costs to set up the defendant in Malaysia amounting to RM1,253,855.10, reimbursement of advances made on behalf of the defendant for the defendant's purpose amounting to RM59,576.83, return of ELT materials amounting to RM837,510.76 and loss of goodwill amounting to RM7,003,910. Aggrieved by the said decision, the plaintiff filed the present appeal against the said decision.

Held, dismissing the appeal with costs of RM10,000:

(1) The court must be guided by the principle that in awarding damages, for breach of contract the principle of 'restitution in integrum' would apply. In short, damages in monetary compensation could be awarded by the court to put back an injured party in the same position before the breach occurred (see para 12).

(2) The plaintiff claimed that the termination was abruptly done without any notice and that it ought to have been given reasonable period for

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termination. However, the plaintiff had also suggested that it was the defendant's practice to give six months notice to previous distributor. By the plaintiff's own pleadings, the plaintiff seemed to suggest that the period between three to six months would be a reasonable notice. However during the assessment inquiry, the plaintiff made sudden turn to claim for five years post termination period (see para13).

(3) The plaintiff had not supported its claim with admissible document to prove its actual loss. It was not enough for the plaintiff to show the fact of damage. The plaintiff must adduce sufficient evidence to prove its claim for damages, failing which the plaintiff would only be entitled to nominal damages. As the plaintiff in this case was claiming for substantial damages for breach of contract it had the burden to prove the fact and amount of damages before it could recover. If the plaintiff failed to prove both the fact and the amount of damages, it would only be entitled to nominal damages (see para 14).

(4) The plaintiff's pleadings were not carefully drafted, in that, there was omission on the part of the plaintiff to specifically plead for special damages to be awarded by the court giving the particulars of those special damages. The plaintiff could not cover the defects in its pleadings by way of affidavit evidence. It was trite that the plaintiff claiming for special damages must specifically plead and provide the particulars of the same in his pleadings (see para 19).

(5) There was no reason to fault and or disturb the DR's findings of facts as well as his award of damages. The DR had correctly addressed his mind as to the facts and the law in awarding the above stated damages to the plaintiff. The award of damages by the DR was primarily based on his findings of facts in the light of evidence adduced during the assessment of damages. The DR was satisfied that the plaintiff had not discharged the burden of proving the amount of damages before he could recover (see para 22).

[Bahasa Malaysia summary

Tuntutan plaintif terhadap defendan adalah bersandarkan kepada penamatan salah perjanjian pengedar eksklusif untuk mengedar dan menjual produk-produk dan/atau material-material *English Language Teaching* ('ELT') yang diterbitkan oleh defendan (pengedar eksklusif). Plaintif mendakwa bahawa penamatan perjanjian pengedar eksklusif telah dibuat secara terburu-buru dan tanpa notis yang diperlukan dan akibat dari itu, ia telah mengalami kerugian. Pihak-pihak kemudian bersetuju untuk memasuki penghakiman persetujuan yang mana defendan mengakui liabiliti dengan ganti rugi yang akan ditaksir oleh mahkamah. Timbalan pendaftar ('TP') menaksir ganti rugi dan mengawardkan RM114,805 untuk kerugian keuntungan bagi tiga bulan dengan faedah dan kos dalam jumlah sebanyak

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RM10,000 untuk dibayar oleh defendan kepada plaintif. TP menolak tuntutan plaintif untuk kos pembayaran ganti untuk menubuhkan defendan di Malaysia berjumlah RM1,253,855.10, pembayaran pendahuluan yang dibuat bagi pihak defendan untuk tujuan pembayaran balik pendahuluan yang dibuat bagi pihak defendan untuk defendan berjumlah RM59,576,83, pemulangan bahan ELT berjumlah RM837,510.76 dan kehilangan nama baik yang berjumlah RM7,003,910. Terkilan dengan keputusan itu, plaintif telah memfailkan rayuan terhadap keputusan tersebut.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Mahkamah mestilah berpandukan prinsip dalam mengawardkan ganti rugi, bagi kemungkiran kontrak prinsip 'restitution in integrum' akan terpakai. Pendek kata, ganti rugi pampasan kewangan boleh diawardkan oleh mahkamah untuk meletakkan kembali pihak yang terjejas dalam kedudukan yang sama sebelum kemungkiran itu berlaku (lihat perenggan 12).

(2) Plaintif mendakwa bahawa penamatan itu dilakukan dengan tiba-tiba tanpa sebarang notis dan ia sepatutnya telah diberi tempoh yang munasabah untuk penamatan. Walau bagaimanapun, plaintif juga telah mencadangkan bahawa ia adalah amalan defendan untuk memberi enam bulan notis kepada pengedar sebelumnya. Dengan pliding plaintif sendiri, plaintif seolah-olah mencadangkan bahawa tempoh antara tiga hingga enam bulan akan menjadi notis yang munasabah. Walau bagaimanapun semasa siasatan penilaian, plaintif menukar fikiran secara tiba-tiba untuk menuntut selama lima tahun selepas tempoh penamatan (lihat perenggan 13).

(3) Plaintif tidak menyokong tuntutannya dengan dokumen boleh terima untuk membuktikan kerugian sebenar. Adalah tidak mencukupi bagi plaintif untuk menunjukkan fakta kerosakan. Plaintif perlu mengemukakan keterangan mencukupi untuk membuktikan tuntutannya untuk ganti rugi, sekiranya gagal plaintif hanya berhak kepada ganti rugi nominal. Memandangkan plaintif dalam kes ini menuntut untuk ganti rugi substansial bagi kemungkiran kontrak ia mempunyai beban untuk membuktikan fakta dan amaun ganti rugi sebelum ia boleh mendapatkannya. Sekiranya plaintif gagal untuk untuk membuktikan kedua-dua fakta dan amaun ganti rugi, ia hanya berhak kepada ganti rugi nominal (lihat perenggan 14).

(4) Pliding plaintif tidak didraf dengan berhati-hati, oleh itu, terdapat peninggalan pada bahagian plaintif untuk mempli dengan spesifik untuk ganti rugi khas yang diawardkan oleh mahkamah berpandukan butir-butir ganti rugi khas tersebut. Plaintif tidak dapat menutup kecacatan dalam plidingnya melalui cara afidavit keterangan. Ia adalah nyata bahawa plaintif menuntut untuk ganti rugi khas mesti mempli

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secara khusus dan mengemukakan butir-butir yang sama dalam plidingnya (lihat perenggan 19).

(5) Tiada sebab untuk menyalahkan atau mengganggu dapatan fakta TP dan juga award ganti ruginya. TP telah dengan betul menumpukan fikirannya kepada fakta dan undang-undang dalam mengawardkan ganti rugi yang tertera kepada plaintif. Award ganti rugi oleh TP adalah dari mula berdasarkan dapatan fakta melalui keterangan yang dikemukakan sewaktu penaksiran ganti rugi. TP berpuas hati bahawa plaintif tidak melepaskan beban membuktikan amaun ganti rugi sebelum dia dapat mendapatkannya (lihat perenggan 22).]

Notes

For a case on appeal against assessment, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) para 272.

Cases referred to

Biggin & Co Ltd v Permanite Ltd [1951] 1 KB 422, KBD (refd)
Bonham-Carter v Hyde Park Hotel Ltd [1948] WN 89, KBD (refd)
Dixon v Deveridge (1825) 2 C & P 109 (refd)
Flint v Lovell [1934] All ER Rep 200, CA (refd)
Gentali (M) Sdn Bhd v Kawasaki Sunrock Sdn Bhd (No 3) [1998] 5 MLJ 409, HC (refd)
Guan Soon Tin Mining Co v Wong Fook Kum [1969] 1 MLJ 99; [1968] 1 LNS 43, FC (refd)
Ilkiw v Samuels & Ors [1963]1 WLR 991; [1963] 2 All ER 879, CA (refd)
Kapt (B) Haji Mohamad bin Ismail v Perwira Affin Bank Bhd [2001] 5 MLJ 101; [2001] 5 CLJ 184, HC (refd)
Letrik Bandar Hup Heng Sdn Bhd v Wong Sai Hong [2002] 5 MLJ 247; [2002] 5 CLJ 170, HC (refd)
Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324, FC (refd)
Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635, HC (refd)
Sunlite Textile Sdn Bhd v Motilal Realty Sdn Bhd (part 2) [2007] 5 MLJ 640; [2008] 7 CLJ 97, HC (refd)
Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd [2011] 4 MLJ 593; [2011] 1 CLJ 105, CA (refd)
Twyman v Knowles (1853) 13 CB 222 (refd)
Voo Nyuk Fah @Peter & Anor v Lam Yat Kheong & Anor [2012] MLJU 159; [2012] 5 CLJ 229, CA (refd)

Zainur bin Zakaria (Kok Onn Aundre with him) (Onn & Partners) for the plaintiff/appellant.
D Norendra (Norendra & Yap) for the defendant/respondent.

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Asmabi Mohamad JC:

BRIEF BACKGROUND

[1] The plaintiff's claim against the defendant was premised on a wrongful termination of an exclusive distributorship agreement for the distribution and sale of English Language Teaching ('ELT') products and/or materials published by the defendant ('exclusive distributorship'). The plaintiff claimed that the termination of the exclusive distributorship agreement was done hastily and without the required notice. The plaintiff claimed that it suffered damages due to the abrupt termination of the said exclusive distributorship agreement to be assessed by the court and costs.

[2] On 11 February 2011 both parties had agreed to enter into a consent judgment whereby the defendant admitted liability with damages to be assessed by the court ('encl 73').

[3] When this matter came up for assessment of damages before the learned deputy registrar ('the DR') both parties had agreed to proceed with the inquiry by way of affidavit evidence. In the course of that ten affidavits were filed for the court's perusal ('encls 78, 79, 81, 83, 84, 85, 86, 88, 89, and 90'). The learned DR had assessed damages and awarded RM114,805 for loss of profit for three months, interests at the rate of 5% from the 13 August 2012 until realisation and costs in the sum of RM10,000 to be paid by the defendant to the plaintiff.

[4] The learned DR had rejected the plaintiff's claim for reimbursement of costs to set up the defendant in Malaysia amounting to RM1,253,855.10, reimbursement of advances made on behalf of the defendant for the defendant's purpose amounting to RM59,576.83, return of ELT materials amounting to RM837,510.76 and loss of goodwill amounting to RM7,003,910. The learned DR had also provided his grounds of judgment.

[5] Aggrieved by the said decision, the plaintiff had filed an appeal against the said decision to the judge in chambers. This appeal came up for hearing before me on 25 February 2013. After perusing all affidavits filed herein and after hearing the submissions of the plaintiff and the defendant, on 18 March 2013 I dismissed the appeal with costs of RM10,000 be paid by the plaintiff to the defendant.

[6] Aggrieved by my decision to dismiss the plaintiff's appeal against the learned DR's decision, the plaintiff filed an appeal to the Court of Appeal Malaysia.

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[7] For the purpose of this appeal and for ease of reference, I would refer to the parties herein in the same manner they were described in the substantive suit, the plaintiff ('the appellant') and the defendant ('the respondent') respectively.

FINDINGS OF THE COURT

[8] In disposing the appeal at hand, I am guided by the established principle that an appellate court would not disturb the findings of facts by the court appealed from unless 'wrong principles of law had been applied' and that 'assessment of damages is an exercise of judicial discretion but it is not to be exercised based on whims and fancies, but by reference, guidance and application of established judicial principles and of course having regard to all facts and evidence adduced before the officer or the judge who undertakes the assessment' (*Tanjung Tiara Sdn Bhd v Southwind Development Sdn Bhd* [2011] 4 MLJ 593; [2011] 1 CLJ 105; *Voo Nyuk Fah @Peter & Anor v Lam Yat Kheong & Anor* [2012] MLJU 159; [2012] 5 CLJ 229).

[9] In deciding the assessment of damages, the learned DR had identified the heads of damages claimed by the plaintiff as follows:

(a) reimbursement of costs to set up the defendant in Malaysia in the sum of RM1,253,855.10;

(b) reimbursement of advances made on behalf of the defendant for the defendant's own purpose amounting to RM59,576.83;

(c) returns of ELT materials amounting to RM837,510.76; and

(d) loss of goodwill amounting to RM7,003,910.

[10] The learned DR had given his reasoning in respect of each of the heads of claim as follows:

(a) reimbursement of costs to set up the defendant in Malaysia in the sum of RM1,253,855.10:

(i) these were costs for warehousing, manpower, sales and marketing costs and other overheads costs and all these costs are up to the plaintiff. The learned DR disallowed this claim as this claim would usually be borne by the distributor. According to the learned DR, the warehousing and manpower costs are part and parcel of the plaintiff's voluntary business decision to become the sole distributorship for the defendant. Further the defendant had no control over or responsibility for such costs as such costs are taken into account in the sales prices. Neither had the defendant imposed it on the plaintiff to incur such costs. As for the sales and marketing costs the learned DR stated that these are business costs, of the

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plaintiff as a distributor for the ELT products. Therefore the defendant should not be held responsible for such costs. The learned DR reiterated that if these costs were to be borne by the defendant, then there was no need for a distributor. Above reasons, this head of claim was rejected by the learned DR.

(Note: This head of claim had not been pleaded by the plaintiff in its amended statement of claim ('ASOC') as part of special damages. Parties cannot use affidavit to cover defects in the pleadings. Neither was the amount substantiated by way of documentary evidence);

(b) reimbursement of advances made on behalf of the defendant for the defendant's own purpose amounting to RM59,576.83:

(i) this was for cash advanced by the plaintiff to the defendant for payment of air tickets for the defendant's representatives and *seminars* expenses in Malaysia which were requested by the defendant's managers. This claim was refused by the learned DR as the plaintiff had not supported its claims by way of documentary evidence. The plaintiff too had not explained in detail how these expenses were incurred. The amount claimed by the plaintiff was also bigger than the amount recognised by the defendant. This head of claim too was rejected by the learned DR.

(Note: This claim ought to have been pleaded and claimed as special damages and to be particularised in the ASOC. In the ASOC, the issue of special damages was not pleaded. In the final ASOC the figures did not correspond with the figures in encl 78 at para 66);

(c) returns of ELT materials amounting to RM837,510.76:

(i) this claim had not been substantiated by the plaintiff in the affidavits filed herein in respect of assessment of damages with reference to any bundles of document before the learned DR. The plaintiff had failed to show how these figures were calculated. Neither had the plaintiff substantiated the claim by way of documentary evidence. Therefore the learned DR rejected this head of claim.

(Note: This head of claim too had not been specially pleaded in the ASOC and proved in court); and

(d) loss of goodwill amounting to RM7,003,910:

(i) according to the learned DR, the plaintiff's claim for loss of goodwill for the following five years (post termination period) was unreasonable and unrealistic. Further the plaintiff had failed to substantiate its claim under this head. The estimated goodwill computed by the plaintiff is also

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commercially unrealistic against its net asset of about RM1.8m and RM1.4m as at 31 December 2005 and 31 December 2006 respectively. It was absurd for the plaintiff to suggest that there was no way for the defendant to terminate the exclusive dealership as there is no such thing as contract forever. It is also not correct and realistic for the plaintiff to assume that the business deal between the parties herein would continue uninterrupted and stay lucrative for the next five years as stated in the report prepared by Ling Eng Chan ('Ling's report'). In fact the agreement provided for termination by giving to other at least three months notice before the date;

(ii) the plaintiff had already benefitted during the pre termination period where the plaintiff had been given very high discounts to encourage sales of the ELT products as well as to promote flexibility for pricing. The plaintiff's business was not dependent on the defendant's product alone but the plaintiff had other businesses such as distribution of MC Cavendish products. In fact the plaintiff's business proceeded and was not in any way interrupted by the termination;

(iii) the learned DR was of the view that based on the affidavit filed herein there was lack of goodwill as the relationship was already deteriorating around mid 2005 to February 2006 leading to the ultimate termination of the exclusive distributorship. This was because both parties were not able to work together. There were issues of non-payment and/or outstanding payment for books, non-repeat adoption, non-pricing of books to market, failure to sell the products and lack of customer service relations. The defendant had also on a few occasions stopped the plaintiff's account due to the plaintiff's failure to settle outstanding bills. Due to all these problems faced by the defendant, the defendant's business in Malaysia had been drastically affected leaving the defendant with no choice but to look for alternative sources to distribute their products. This had been crystallised in the consent judgment. These were among the reasons given by the learned DR as to why he was of the view that there was no issue of goodwill in the matter;

(iv) at the time the memorandum of agreement was signed by the plaintiff to signify the plaintiff's willingness to be the defendant's exclusive distributor, the plaintiff had the expectation that the agreement would provide for three months notice for its termination. Despite the fact that the memorandum of agreement was only signed by the plaintiff and had not been fully executed, it was a good indication of what both parties had in mind at the time of the agreement. The learned DR was of the view with this background that both parties had pre-empted and had the expectation that the notice for termination would be three months. Hence the learned DR had correctly taken this period into consideration for purposes of calculation of general damages for loss of profit. The

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learned DR had opted to adopt the defendant's expert report and used the formula suggested by the defendant's expert in awarding damages of RM38,268 per month times three months which was equivalent to RM114,805. The learned DR was of the view that the defendant's expert report was more realistic as compared to the plaintiff's expert report which was based on unrealistic assumption and unacceptable;

(v) in determining this head of claim, the learned DR had applied the principle enunciated in the case of *Gentali (M) Sdn Bhd v Kawasaki Sunrock Sdn Bhd (No 3)* [1998] 5 MLJ 409. It was decided in this case that an award for loss of profits should put the plaintiff in the same position as if the breach had not occurred. It should not be based on speculation that the market could be lucrative in the future; and

(vi) the report prepared by Ling Eng Chan could not be relied upon as Ling had failed to take into consideration the lack of goodwill/good efforts by the plaintiff. The basis of Ling's report was merely based on assumptions that the plaintiff's business deal with the defendant would continue for a period of five years post termination. Whereas the arrangement between the plaintiff and the defendant provided that the agreement could be terminated with three months notice. The Ling's report was based on FRS3 accounting standard, which applies to the method of accounting for goodwill from a business combination. The sensitivity table set by Ong Tee Chin in his report in exh 'OTC1' to encl 83 is more realistic range of the estimation in terms of the said notice. Ong's figure was based on the highest gross margins derived from AA (32%). Based on the table provided the estimation would be RM38,268 times three months.

(Note: the plaintiff had not pleaded for loss of goodwill in the ASOC. Therefore this claim ought not to be entertained by this court).

[11] At the outset of the appeal, learned counsel for the plaintiff informed the Court that the plaintiff would not be pursuing its claim of RM185,530 in respect of staff cost (warehouse) in item (b) of para 66 of encl 78.

[12] The court must be guided by the principle that in awarding damages, for breach of contract the principle of 'restitution in integrum' applies. In short it means that damages in monetary compensation can be awarded by the court to put back an injured party in the same position before the breach occurred.

[13] The plaintiff claimed that the termination was abruptly done without any notice. Hence the plaintiff claimed that it ought to have been given reasonable period for termination. However the plaintiff had also suggested that it was the defendant's practice to give six months notice to previous distributor. By the plaintiff's own pleadings, the plaintiff seemed to suggest

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that the period between three to six months would be reasonable notice. However during the assessment inquiry, the plaintiff made sudden turn to claim for five years post termination period (see paras 6 and 19 of ASOC).

[14] On perusal of the documentary evidence relied by the plaintiff, I found that the plaintiff had not supported its claim with admissible document to prove its actual loss. It is not enough for the plaintiff to show the fact of damage. The plaintiff must adduce sufficient evidence to prove its claim for damages, failing which the plaintiff shall only be entitled to nominal damages. As the plaintiff in this case was claiming for substantial damages for breach of contract it had the burden to prove the fact and amount of damages before it can recover. If the plaintiff failed to prove both the fact and the amount of damages it would only be entitled to nominal damages (see *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635; *Dixon v Deveridge* (1825) 2 C & P 109; *Twyman v Knowles* (1853) 13 CB 222).

[15] The classical dictum of Lord Goddard in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89 which had been quoted in numerous Malaysian cases is reproduced below as follows:

> Plaintiff must understand that if they bring actions for damages it is for them to prove their damages; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying, 'This is what I have lost, I ask you to give me these damages'. They have to prove it.

(see the cases of *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99; [1968] 1 LNS 43; *Kapt (B) Haji Mohamad bin Ismail v Perwira Affin Bank Bhd* [2001] 5 MLJ 101; [2001] 5 CLJ 184; *Sunlite Textile Sdn Bhd v Motilal Realty Sdn Bhd (part 2)* [2007] 5 MLJ 640; [2008] 7 CLJ 97; *Letrik Bandar Hup Heng Sdn Bhd v Wong Sai Hong* [2002] 5 MLJ 247; [2002] 5 CLJ 170)

[16] 'With regards to the quality of evidence for the purpose of assessment of damages, His Lordship Devlin J said in *Biggin & Co Ltd v Permanite Ltd* [1951] 1 KB 422, at p 438:

> Where precise evidence is obtainable, the court naturally expects to have it, where it is not, the Court must do the best it can'. Nevertheless, it remains true to say that generally 'difficulty of proof does not dispense with the necessity of proof' (see *Aerial Advertising Co v Batchelors Peas* [1938] 2 All ER 788, at p 796 per Atkinson J). A case which affords an illustration of the requirement of reasonable certainty in this area is *Ashcroft v Curtin* [1971] 1 WLR 1731 (CA) in which the plaintiff was claiming for diminution of profits of his one man business failed in his claim even though the evidence pointed to a decrease in the company's profitability due to the injury, the records produced being too rudimentary and the accounts too unreliable to quantify the loss. So also when, as here, the claim is for the difference between the

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contract price and a clear and undoubted market price, absolute certainty in proving damages is possible and therefore the Court will expect precise evidence to be given, (see para 345 *McGregor on Damages*, (15th Ed)).

[17] In *Popular Industries Limited v The Eastern Garment Manufacturing Sdn Bhd* at pp 647–648 the court said:

> ... a plaintiff would at least be required to produce books or documents showing that he had a business in the course of which he might reasonably have distributed these goods and the price he would have obtained. The plaintiff's in this case did none of these things, producing no business books or accounts or documents showing the existence of and dealing with customers or even income tax returns.
>
> To put it another way, a plaintiff's unsupported assertion or that of his accountant, that he would have got such a price for the goods does not prove market value. It must be proved aliunde—that is to say, in order to prove that someone would have been prepared to pay the price, you call the man who would have paid. Any plaintiff can say. 'I could have sold my goods for $X had it not been for what the defendant did'. If that is enough to prove market value, it would, in effect, dispense with proof of quantum altogether.
>
> In all circumstances, reason and justice point to the inevitable conclusion that although the plaintiff's had shown the fact of damage, no evidence or no sufficient evidence has been adduced as to its amount with the perhaps unfortunate result that it is virtually impossible to assess damages, (see *Dixon v Deveridge* and *Twyman v Knowles*).

[18] From the above quoted cases it is obvious that that even if the court was of the view that the plaintiff had suffered losses, the court will not be in a position to award damages unless the court is satisfied that the plaintiff had proved the losses suffered by it. From the evidence that was adduced by the plaintiff, it was obvious that the plaintiff was not able to prove its damages by way of documentary evidence.

[19] Further the plaintiff's pleadings were not carefully drafted, in that, there was omission on the part of the plaintiff to specifically plead for special damages to be awarded by the court giving the particulars of these special damages. The plaintiff could not cover the defects in its pleadings by way of affidavit evidence. It is trite that the plaintiff who is claiming for special damages must specifically plead and provide the particulars of the same in his pleadings. In *Ilkiw v Samuels & Ors* [1963] 1 WLR 991; [1963] 2 All ER 879 Diplock LJ said '... In my view, it is plain law — so plain that there appears to be no direct authority because everyone has accepted it being the law for the last hundred years — that one can recover in an action only special damage which has been pleaded, and, of course proved'.

[20] In *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 the Federal

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Court held that:

> It is a well established principle that special damages in contrast to general damages, have to be specifically pleaded and proved. They are recoverable only where they can be included in the proper measure of damages are not too remote (see *Halsbury's Laws of England* (4th Ed), vol 11 p 218 para 386). That in our view is the cardinal principle adopted by all courts both in England and this country. The same principle was adopted by Ong Hock Thye, FJ (as he then was) in *Yee Hup Transport & Co and Anor v Wong Kong* [1967] 2 MLJ 93 which was an appeal on quantum of damages. Quoting an excerpt from the judgment of Wilmer LJ in *Ilkiw v Samuels & Ors* [1963] 1 WLR 991; [1963] 2 All ER 879 he held that general damages should not be awarded as though they were special damages properly pleaded and proved. Similarly Chang Min Tat, FJ (as he then was) in *Murtadza bin Mohamed Hassan v Chong Swee Plan* [1980] MLJ 216 applied the principle in *Ilkiw v Samuels & Ors* that special damages if pleaded as in that case could be recovered.

[21] *Mayne and MacGregor on Damages* (12th Ed), para 970 was also quoted in *Ong Ah Long v Dr S Underwood* as follows:

> Special damage consists in all items of loss which must be specified by (the plaintiff) before they may be proved and recovery granted. The basic test of whether damage is general or special is whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial.

[22] Upon my evaluation of the learned DR's reasoning I have no reason to fault and or disturb the learned DR's findings of facts as well as his award of damages as stated above. The learned DR had correctly addressed his mind as to the facts and the law in awarding the above stated damages to the plaintiff. The award of damages by the learned DR was primarily based on his findings of facts in the light of evidence adduced during the assessment of damages. The learned DR was satisfied that the plaintiff had not discharged the burden of proving the amount of damages before he could recover.

[23] The assessment of damages is an exercise of judicial discretion and hence seldom disturbed by the court hearing the appeal unless where there is clear error on the principles of law or the amount is erroneous and without any basis or justification (*Flint v Lovell* [1934] All ER Rep 200, referred). The learned DR did give his reasons to justify his findings by reference, guidance and application of established judicial principles and of course having regard to the facts and evidence adduced before the learned DR.

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CONCLUSION

[24] For the above reasons, I could not find any plausible reason to disturb the decision of the learned DR in his assessment of damages. Accordingly I dismissed the plaintiff's appeal with costs of RM10,000 to be paid by the plaintiff to the defendant.

Appeal dismissed with costs of RM10,000.

Reported by Afiq Mohamad Noor